

## 48A C.J.S. Judges § 323

Corpus Juris Secundum | August 2023 Update

### Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

### IX. Disqualification to Act

#### D. Objections to Judge and Proceedings Thereon

#### 2. Mode and Sufficiency of Raising Objection

##### b. Affidavit of Bias or Prejudice

## § 323. Extrajudicial nature of bias and prejudice

[Topic Summary](#) | [References](#) | [Correlation Table](#)

### West's Key Number Digest

West's Key Number Digest, [Judges](#)  51(3)

**An affidavit of bias or prejudice may not be premised on a charge of bias that is judicial in nature, and in order for the affidavit to be sufficient, the alleged bias must be rooted in extrajudicial sources.**

An affidavit of bias or prejudice may not be grounded on a charge of bias that is judicial in nature<sup>1</sup> or on judicial actions which can be corrected on appeal.<sup>2</sup> Rather, the bias asserted must be rooted in extrajudicial sources.<sup>3</sup> In other words, the bias or prejudice alleged must have its basis in other than what the judge learned from his or her participation in either the pending case or a prior case.<sup>4</sup> Merely showing that the judge has made adverse rulings, actions, or statements during the course of the litigation<sup>5</sup> or, in some other suit,<sup>6</sup> is insufficient.

Furthermore, an allegation showing the mere pendency of another lawsuit brought against the judge by one of the parties,<sup>7</sup> or an allegation showing no more than an expression by the judge of a prior opinion on a legal question,<sup>8</sup> is insufficient. It has been held, however, that an affidavit of bias and prejudice is entitled to consideration even though it recites matters which occurred during the hearing of a case.<sup>9</sup> It has also been held that it may be sufficient to allege as a basis of a claim of bias statements of the judge in a prior proceeding which constituted mere speculation not supported by the record<sup>10</sup> or the making of erroneous rulings in such a manner and under such circumstances as to indicate bias and prejudice.<sup>11</sup>

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Footnotes

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U.S.—*Hepperle v. Johnston*, 590 F.2d 609 (5th Cir. 1979).

D.C.—*Matter of Evans*, 411 A.2d 984 (D.C. 1980).

**Reduction of attorney's fees**  
 D.C.—*Gregory v. U. S.*, 393 A.2d 132 (D.C. 1978).

**Denial of prior motion**  
 Alaska—*Koeneman v. Boersma*, 2011 WL 6116480 (Alaska 2011).
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U.S.—*Smith v. Danyo*, 585 F.2d 83, 26 Fed. R. Serv. 2d 620 (3d Cir. 1978).

**Previous reversal of judge insufficient**  
 Kan.—*Oswald v. State*, 221 Kan. 625, 561 P.2d 838 (1977).

**Previous grant of mistrial insufficient**  
 La.—*State v. Bennett*, 341 So. 2d 847 (La. 1976).

**Illegal original sentence insufficient**  
 Ariz.—*State v. Foggy*, 107 Ariz. 307, 486 P.2d 789 (1971).
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U.S.—*Ullmo ex rel. Ullmo v. Gilmour Academy*, 273 F.3d 671, 159 Ed. Law Rep. 521, 2001 FED App. 0416P (6th Cir. 2001).

Ga.—*Moore v. State*, 313 Ga. App. 519, 722 S.E.2d 160 (2012) (overruled on other grounds by, *Mayor & Aldermen of City of Savannah v. Batson-Cook Co.*, 291 Ga. 114, 728 S.E.2d 189 (2012)).

Ill.—*Deutsche Bank Nat. Trust Co. v. Nichols*, 2013 IL App (1st) 120350, 375 Ill. Dec. 220, 997 N.E.2d 223 (App. Ct. 1st Dist. 2013).

Iowa—*State v. Smith*, 242 N.W.2d 320 (Iowa 1976).
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U.S.—*U.S. v. Gigax*, 605 F.2d 507 (10th Cir. 1979) (disapproved of on other grounds by, *U.S. v. Lang*, 364 F.3d 1210 (10th Cir. 2004)).

D.C.—*Gregory v. U. S.*, 393 A.2d 132 (D.C. 1978).

**Evidence presented and conduct observed**  
 U.S.—*King v. U.S.*, 434 F. Supp. 1141 (N.D. N.Y. 1977), order aff'd, 576 F.2d 432 (2d Cir. 1978).
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U.S.—*Hepperle v. Johnston*, 590 F.2d 609 (5th Cir. 1979).

Vt.—*Pettengill v. New Hampshire Ins. Co.*, 129 Vt. 23, 270 A.2d 883 (1970).

**Alleged friction with counsel grossly insufficient**  
 U.S.—*Plaquemines Parish School Bd. v. U.S.*, 415 F.2d 817 (5th Cir. 1969).

**Negative facial expressions insufficient**  
 Colo.—*Bruce v. City of Colorado Springs*, 252 P.3d 30 (Colo. App. 2010).
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U.S.—*Kennedy v. Meacham*, 540 F.2d 1057 (10th Cir. 1976); *U.S. v. Sinclair*, 424 F. Supp. 715 (D. Del. 1976).

Ala.—*Wallis v. State*, 51 Ala. App. 499, 286 So. 2d 909 (Crim. App. 1973).

Tex.—*Quarles v. Smith*, 379 S.W.2d 91 (Tex. Civ. App. Houston 1964), writ refused n.r.e., (Oct. 7, 1964).

**Behavior in codefendant's trial**

La.—*State v. Bennett*, 341 So. 2d 847 (La. 1976).

**Judge as district attorney in previous trial**

Cal.—*People v. Perez*, 14 Cal. App. 3d 368, 92 Cal. Rptr. 256 (4th Dist. 1971).

**Derogatory statements from report**

It was not grounds for disqualification of a judge that in a prior case involving another defendant, he summarized the presentence report containing derogatory information concerning the present defendant and imposed a special condition of probation, later rescinded on his own initiative; that the defendant in that case not associate with the present defendant; or that he referred to cases against the present defendant as "associated cases."

U.S.—*U.S. v. Civella*, 416 F. Supp. 676 (W.D. Mo. 1975).

7 Tex.—*Citizens Law Institute v. State*, 559 S.W.2d 381 (Tex. Civ. App. Dallas 1977).

8 U.S.—*Maret v. U.S.*, 332 F. Supp. 324 (E.D. Mo. 1971).

Ariz.—*In re Guardianship of Styer*, 24 Ariz. App. 148, 536 P.2d 717 (Div. 2 1975).

Cal.—*People v. Darby*, 114 Cal. App. 2d 412, 250 P.2d 743 (2d Dist. 1952).

**Definite views on bail**

U.S.—*U.S. v. Devlin*, 284 F. Supp. 477 (D. Conn. 1968).

9 U.S.—*Tenants and Owners in Opposition to Redevelopment (TOOR) v. U.S. Dept. of Housing and Urban Development (HUD)*, 338 F. Supp. 29 (N.D. Cal. 1972).

Kan.—*Hulme v. Wolesslagel*, 208 Kan. 385, 493 P.2d 541 (1972).

10 U.S.—*U.S. v. Womack*, 454 F.2d 1337, 24 A.L.R. Fed. 276 (5th Cir. 1972).

Fla.—*Miami Retreat Foundation v. Holt*, 48 So. 2d 833 (Fla. 1950).

11 Haw.—*Peters v. Jamieson*, 48 Haw. 247, 397 P.2d 575 (1964).